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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

HOWARD C. LINCOLN,
NEIL C. LEROY,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED

I. Whether a defendant's right under the Fifth Amendment to The United States Constitution not to be placed twice in jeopardy prohibits the government from seeking a greater sentence under the Sentencing Guidelines based upon alleged criminal conduct of which defendant was acquitted at trial.

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v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners HOWARD C. LINCOLN and NEIL C. LEROY respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on April 13, 1993.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is unreported, but is reprinted in a separate appendix volume.

JURISDICTIONAL STATEMENT

On April 13, 1993, The United States Court of Appeals ruled that petitioners had been properly convicted under 18 U.S.C. Section 371 and rejected their argument that their sentences had been improperly enhanced by the use of alleged criminal conduct of which petitioners had been acquitted. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).[1]

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[1] The Court of Appeals remanded to the District Court a separate issue concerning petitioner's suppression motion. As there will be no further proceedings concerning the issues upon which review is now sought in this petition, this petition should be granted notwithstanding the remand on the unrelated suppression issue. The District Court has since declined to suppress the evidence and the case is again awaiting resentencing of the Petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

Petitioner Lincoln was president of Lincoln Metal Processing, Inc., and Petitioner Leroy was an employee. Both petitioners were indicted under 18 U.S.C. Section 371 for conspiring to transport stolen property in interstate commerce in violation of 18 U.S.C. Section 2314, and for seven (7) counts of substantive violations of 18 U.S.C. Section 2314.

Count One of the indictment alleged that petitioners had conspired to obtain high grade copper from the General

Electric Company facility in Erie County, Pennsylvania, which had a contract with Lincoln Metal to remove scrap metal from the facility. The indictments alleged that petitioners conspired to mix the high grade cooper with other scrap metal that was being removed from the General Electric facility, and then have the copper removed and sent out of Pennsylvania. Counts Two through Eight each alleged that petitioners had in fact illegally removed a quantity of copper from the General Electric facility and then shipped the stolen metal in interstate commerce.

The petitioners were tried before a jury. At the close of the government's case, three (3) of the substantive counts were dismissed. The jury ultimately found both petitioners not

guilty on the remaining four (4) substantive counts, but convicted petitioners of the conspiracy charged in Count One.

Each petitioner's pre-sentence report recommended an eight-level increase in the offense level based upon the value of the copper set forth in each of the substantive counts. Both petitioners objected to the use of conduct of which they had been acquitted to enhance their sentences, and argued that neither the Sentencing Guidelines nor the Fifth Amendment permitted re-litigation of the allegations concerning the substantive thefts of copper once the jury acquitted petitioners of those charges. The District Court rejected these objections and found the value of the stolen copper to be as alleged by the government. The United States Court

of Appeals for the Third Circuit affirmed. The United States District Court for the Western District of Pennsylvania had original subject matter jurisdiction of this case pursuant to 18 U.S.C. Sec. 3231. The United States Court of Appeals for the Third Circuit had appellate jurisdiction of this case pursuant to 28 U.S.C. Sec. 1291.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE THIRD CIRCUIT ALLOWING THE GOVERNMENT TO SEEK CRIMINAL PUNISHMENT BASED UPON ALLEGATIONS REJECTED BY THE JURY AT TRIAL, IN VIOLATION OF PETITIONERS' RIGHT NOT TO BE PUT TWICE IN JEOPARDY, CONFLICTS WITH THE APPLICABLE DECISION OF THIS COURT.

The Fifth Amendment to the United States Constitution states that no person shall "be subject for the same offense to be twice put in jeopardy." Both petitioners were put in jeopardy for each of the alleged thefts of copper when the government sought to persuade a jury to convict them of the seven (7) substantive charges in the indictment. The jury, however, acquitted petitioners of the substantive charges. The government then sought to place petitioners in jeopardy of increased sentences by re-litigating the issue

whether petitioners were criminally responsible for these thefts by seeking a significant enhancement of their sentences based upon the value of the copper allegedly stolen. The District Court, and the Third Circuit, allowed the government to put petitioners in jeopardy a second time during sentencing for the same offenses of which they were acquitted solely on the ground that the government's lower burden of proof at sentencing allowed the government to relitigate issues rejected by the jury at trial.

The concept that the protection offered by the double jeopardy clause may be avoided by the use of a lower standard of proof during a second attempt by the government to prove allegations of criminal conduct is not supported by any language in the Fifth

Amendment and is inconsistent with this Court's decision in Coffey v. United States, 116 U.S. 436 (1886). In Coffey this Court rejected the government's argument that double jeopardy was not implicated by a forfeiture action instituted following an acquittal in a criminal case because the government would have a lighter burden of proof in the forfeiture action.

> [W]here an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person ... It is urged that as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt and that, on the same evidence, on the question of preponderance of proof there might be a verdict for the

> United States, in the suit in rem. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is punishment therefore.

116 U.S. at 443.

Although this Court has since held that collateral estoppel does not prevent the government from re-litigating in a civil case - in which the government must only prove its case by a preponderance of the evidence - issue decided against the government in a criminal case, United States v. One Assortment of Firearms, 465 U.S. 354 (1984); One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972); Helvering v. Mitchell, 303 U.S. 391 (1930), this Court has never held that, under Coffey, double jeopardy does not apply to a second attempt to extract

criminal sanctions under a lower standard of proof. Indeed, this Court's decisions in One Assortment of Firearms, One Lot Emerald Cut Stones, and Helvering, all depended upon the conclusion that the government's second attempt to prove facts rejected in a criminal trial came in truly civil, rather than criminal litigation, in which double jeopardy had no application.

This Court's recognition in Coffey that double jeopardy does not depend upon the standard of proof is consistent with the language and purpose of the Fifth Amendment. In stating that no person shall "be subject to the same offense to be twice put in jeopardy," the Fifth Amendment did not simply give the common law rule of collateral estoppel constitutional stature; the

Fifth Amendment completely prohibited the government from a second attempt at extracting criminal punishment for an alleged crime after a failed first attempt regardless of any procedural differences in the proceedings, including any differences in burdens of proof. Although double jeopardy incorporates the doctrine of collateral estoppel, Ashe v. Swenson, 397 U.S. 436 (1979), it is not limited to the reach of collateral estoppel.

If, as petitioner's contend, Coffey established that the application of double jeopardy does not depend upon varying standards of proof, then the sentencing hearing in this case violated petitioners' double jeopardy rights. Under the Sentencing Guidelines, the sentence the Court had to give was largely dependent upon whether the

government could establish that petitioners were criminally responsible for the thefts set out in the substantive counts of the indictment. Unless the government succeeded in proving these allegations, petitioners could receive no more than six (6) months imprisonment; if the government succeeded, petitioners could receive no less than fifteen (15) months. Petitioners were in jeopardy of conviction and sentencing on these allegations during the trial, and prevailed. The government's successful attempt to seek the same result by relying on the same allegations during the sentencing hearing clearly placed petitioners in jeopardy a second time.

The Court, in Coffey, held that the government could not circumvent a defendant's double jeopardy rights by

relying on varying standards of proof. In allowing the government to seek a sentence based upon acquitted conduct, the Third Circuit rendered an opinion in conflict with Coffey and the petition should therefore be granted.

II. WHETHER DOUBLE JEOPARDY PROHIBITS BASING A SENTENCE UPON CRIMINAL CONDUCT OF WHICH PETITIONERS WERE ACQUITTED BY A JURY PRESENTS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE DECIDED BY THIS COURT.

With the advent of the Sentencing Guidelines the nature and importance of sentencing hearings changed dramatically. Courts no longer exercise discretion in shaping sentences, but rather must sentence within prescribed guidelines once they find that certain offense characteristics exist. This case starkly presents the issue of whether the government, having failed to

prove allegations of criminal conduct at trial, may seek to achieve the same result by seeking to prove that conduct at a sentencing hearing, simply because the standard of proof is lower at the sentencing hearing. Although petitioners contend that this Court decided that the protection against double jeopardy did not hinge upon the standard of proof over 100 years ago in Coffey, to the extent this issue remains unresolved it is of vital importance to the administration of criminal justice in the federal courts.

The constitutional protection against double jeopardy is rooted in the special weight accorded an acquittal. "[W]e necessarily afford absolute finality to a jury's verdict of acquittal - no matter how erroneous its decision." Burks v. United States, 437

U.S. 1, 16 (1978). Although the government may be allowed to make use of evidence that resulted in an acquittal in seeking a conviction for a different crime, Dowling v. United States, 493 U.S. 342 (1990), and may seek appellate review of a sentence, based upon the record as developed before the trial court, United States v. D.Francesio, 449 U.S. 117 (1980), this Court has never held that double jeopardy permits the government to have a second chance to prove that a defendant should be specifically punished for criminal conduct once these allegations have been rejected by a jury.

The only rational offered in support of allowing the government to make a defendant run the gauntlet a second time is that the sentencing proceeding involves a lower standard of

proof. A defendant's right not to be twice placed in jeopardy, unlike the common law right to collaterally estop re-litigation of certain issues, does not depend upon the standard of proof. The protection against double jeopardy is intended to grant finality to a jury's verdict and prevent the government from wearing down a defendant through repeated trials. Allowing the government to seek an enhanced punishment by relying on acquitted conduct, however, directly infringes these important goals regardless of the differences in the standard of proof.

One hypothetical should serve to illustrate the point; the government, rather than bringing all of the charges in one indictment, could seek successive trials for each of the alleged thefts, charging one count for each trial. The

government could lose all but the last trial and then obtain the same sentence as if it had won all the trials by simply seeking to use evidence of each theft - rejected by the previous juries - to enhance the offense level at sentencing for the last offense. The government, of course, would have no incentive to put a defendant through this ordeal if the thefts for which the defendant was acquitted could not be used to enhance his sentence; conversely, the government has little reason not to string out the charges in this manner if it may seek and obtain the same sentence using the acquitted conduct when, having successfully worn the defendants down, it obtains a conviction. In essence, a defendant who obtains an acquittal cannot rest assured that the same allegations of criminal

conduct will not be used later to seek an enhanced sentence on other charges. Allowing the government to relitigate in a sentencing hearing allegations that have been rejected by the jury strikes directly at the heart of the double jeopardy clause, and this Court should grant the petition to determine this issue.

III. IN ALLOWING PETITIONERS' SENTENCE TO BE ENHANCED BASED UPON ALLEGATIONS OF CRIMINAL CONDUCT OF WHICH PETITIONERS WERE ACQUITTED THE THIRD CIRCUIT RENDERED AN OPINION IN CONFLICT WITH ANOTHER CIRCUIT.

Petitioners' sentencing starkly presents the issue whether a criminal defendant can receive an enhanced sentence under the Sentencing Guidelines based upon allegations of criminal conduct of which the defendant was acquitted by the jury. Faced with the

same issue, the United States Court of Appeals for the Ninth Circuit held that acquitted conduct was not relevant under the Sentencing Guidelines and could not be considered in sentencing. United States v. Brady 928 F.2d 844 (9th Cir 1991). The Court observed that "[w]e would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted." 928 F.2d at 851. The Court recognized that the Sentencing Guidelines set punishment based upon the crime of conviction, and that a "sentencing court should not be allowed to circumvent this statutory directive by making a finding of fact - under any standard of proof - that the jury has necessarily rejected by its judgment of acquittal." Id. The Court concluded that, as a manner of statutory

construction, acquitted conduct was not relevant to sentencing under the Sentencing Guidelines.

Although a number of circuits have agreed with the position taken by the Third Circuit in this case, see e.g. United States v. Rodriguez-Gonzales, 899 F.2d 177, 180-81 (2d Cir. 1990); United States v. Isom, 886 F.2d 736 (4th Cir. 1989), trial courts following these rulings have not always been willing to consider acquitted conduct in deciding the defendant's offense level. See United States v. Guadagno, 766 F. Supp. 617 (N.D. Ill 1991) (refusing two-point adjustment for obstruction of justice based upon defendant's acquittal on this court.) As a result, some defendants are given the benefit of the jury's verdict while others are not.

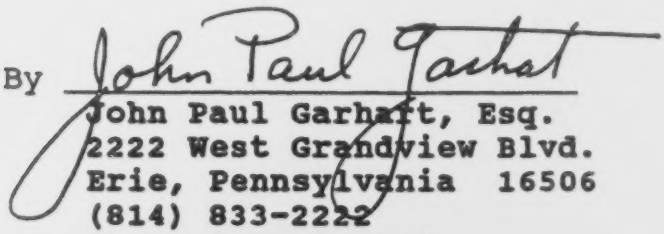
The conflict between Brady and the decision in this case is of crucial importance to the administration of criminal justice under the Sentencing Guidelines. Partial acquittal on multi-count indictments are common, and a rule that ignores the fact that the jury rejected part of the government's proof in sentencing seriously undermines the respect a jury verdict should receive. In essence, the government will obtain the same result if it obtains a conviction on one count as it would if it obtained a conviction on all counts; the sentencing hearing becomes the government's second - and significantly easier - attempt at extracting punishment for allegations of criminal conduct rejected by the jury. This Court should grant the petition to determine whether the Sentencing

Guidelines allow sentences predicated upon acquitted conduct.

CONCLUSION

Petitioners respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to review that Court's decision affirming petitioners' sentences.

Respectfully submitted,

By 

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Supreme Court, U.S.
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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-3053 and 92-3073

UNITED STATES OF AMERICA,
Appellee,

v.

HOWARD C. LINCOLN, NEIL C. LEROY, and
WILLIAM P. HENRY

HOWARD C. LINCOLN,
Appellant in 92-3053
NEIL C. LEROY,
Appellant in 92-3073

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA
(D.C. Criminal No. 91-00010E)

Argued: September 22, 1992
Before: HUTCHINSON, ALITO and SEITZ,
Circuit Judges

(Opinion Filed: April 13, 1993)

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OPINION OF THE COURT

ALITO, Circuit Judge:

Following a jury trial in the United States District Court for the Western District of Pennsylvania, Howard C. Lincoln and Neil C. Leroy were

convicted under 18 U.S.C. § 371 of conspiracy to commit an offense against the United States by transporting stolen property in interstate commerce in violation of 18 U.S.C. § 2314. They now appeal, contending: 1) that the district court erred in refusing to suppress evidence that they claim was seized in violation of their Fourth Amendment rights; 2) that their conduct did not violate 18 U.S.C. § 371 because that provision applies to only those conspiracies in which the United States itself is in some concrete sense the target; 3) that the district court erred in calculating their sentences based in part on conduct underlying counts of the indictment on which they were acquitted; and 4) that the district court erred in calculating their sentences by refusing to grant a two-point reduction of

offense level for acceptance of responsibility.

Because the district court denied the defendants' suppression motions without making any findings of fact, we are unable, based on the present record, to review the district court's decision on that issue. Accordingly, we will remand for the district court to make pertinent factual findings. We find no merit in the defendants' remaining arguments.

I.

The evidence at trial showed that the defendants conspired to steal scrap copper from a General Electric (GE) plant in Erie, Pennsylvania, and to ship the copper across state lines. Lincoln Metal Processing, Inc., of which Lincoln was president and Leroy an employee, had

a contract with GE to purchase and remove scrap metal from the GE plant. The defendants plotted to have a co-conspirator at the plant fill "roll-offs"[1] with a considerable amount of copper and then add a top layer of steel concealing the copper. Under the defendants' scheme, GE would bill Lincoln Metal for these loads at the price per pound for scrap steel, which is substantially less than that for copper. These loads would then be hauled away; the steel would be removed; and the copper would be shipped out of state for resale at a considerable profit.

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[1] A "roll-off" is a large open-topped metal bin used to store and transport scrap. Once a roll-off is filled with scrap, it can be loaded onto a truck, moved, and off-loaded again as a unit. A roll-off can also be moved as a unit within a scrap yard by crane.

The conspiracy began to unravel on August 29, 1989, when Robert Fuchs, a truck driver employed by Lincoln Metal, became suspicious about a load that he had transported the day before from GE to Lincoln Metal's Chestner yard. He had left the roll-off outside the fence of the yard. After hearing some gossip by co-workers regarding the actual contents of the roll-off, he looked inside the roll-off himself before going home for the day. J.A. 423-25. Under the steel, he found that the roll-off was full of copper. We shall refer to this as the "Fuchs search."

After getting home, Fuchs called Harry Holmwood, a friend of his who was an Erie County deputy sheriff, and told him of his findings and suspicions. Holmwood in turn called Mark Watts, a county detective. The three of them met

sometime after 8:00 p.m. and drove together to the site of the roll-off. They confirmed that it contained copper and took some pieces of copper out. We shall refer to this as the "Watts search."

Watts then called the Lawrence Park Township police. Just before midnight, Watts, Fuchs, and Holmwood went to the Lawrence Park police station, where they spoke with Sergeants Olson and Middendorf. Following these conversations, Middendorf and Holmwood drove to the roll-off; they again confirmed again that it contained copper and removed some additional pieces of copper. We shall refer to this as the "Middendorf search."

Upon returning to the police station, Middendorf contacted David Seyboldt, a GE employee. Seyboldt came

to the station, examined a piece of the copper that Middendorf had removed from the roll-off, and stated that it was similar to the scrap that GE produced. On the following morning, August 30, Seyboldt went by himself to the roll-off, determined that it contained a great deal of copper of the sort that GE produced, and then informed the police. We shall refer to this as the "Seyboldt search. "

Middendorf then swore out an affidavit of probable cause and applied to a state district justice for a warrant to seize the roll-off and its contents. J.A. 24-27. The affidavit relied on the Fuchs search as showing the presence of copper in the roll-off and on information from Seyboldt as showing that the copper was GE's. The affidavit also relied on information

from both Fuchs and Seybold about Lincoln Metal's and GE's practices in handling copper scrap as showing that the copper in the roll-off had been taken from GE unlawfully.[2] The

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[2] The probable cause portion of the warrant, sworn to by Sergeant Middendorf, reads as follows (J.A. 24, 26):

At approx. 2350 hrs, 8/29/89, Sgt. Olson (Lawrence Park Twp Police Dept) received information from a truck driver (Robert W. Fuchs, 2507 Raspberry St, Erie) reporting that he believed he had hauled a load of stolen copper from the Erie General Electric Company. Fuchs reported that on 8/28/89 he received instructions from the Lincoln Metal Yard Superintendent (first name of Neil, last name unknown by Fuchs) his employer, to go to the General Electric Company/Building 13 and pick up a load of Silicon Steel. He was instructed to take the load to Joseph Chestner & Son's, 2245 E. 16th St, Erie and drop the load (metal bin) in the road, that he was not to dump the load because the pile was being moved. Fuchs said he normally dumped the loads at Chestner and thought the request was odd, but thought nothing more of the load. On 8/29/89 Fuchs returned to Chestners (in the office) and overheard two men talking about the load he had previously dropped. He overheard one man, whom he knows by the first name of

Bob (last name unknown) and who is the yard foreman, tell the other man that there is copper in the bottom of the load and that they would be using a magnet to removed the silicone steel which had been placed on top. After hearing this Fuchs said he walked out to the metal bin (that he had previously dropped off) moved some of the silicone steel aside and noticed what he believed was thousands of pounds of copper in the bottom of the bin.

Upon seeing this copper Fuchs recalled that his instructions had been to pick-up silicone steel (instructions from the Lincoln Yard Superintendent), that he had signed a materials pass and weigh slip at the General Electric for Silicone steel and no where was copper metal to be part of this load. Believing he was unknowingly involved in this theft, Fuchs contacted a friend, Harry Homewood who is an Erie County Deputy Sheriff, who in turn contacted the Erie County Detective Mark Watts (DA's office), who turned the incident over to Sgt. Olson.

At 0900 hrs, 8/30/89, Chief Krahe, Lawrence Park Township Police Dept, learned from David Seyboldt, Erie General Electric Salvage Manager that the copper removed by Fuchs was their property and that it was stolen. Seyboldt said he viewed the copper and recognized it as coming from the General Electric Plant. He said that under no circumstances would this copper have been loaded or stored in the metal bin, that copper is a regulated metal at General Electric and could not

affidavit made no explicit reference to the Watts, Middendorf, or Seyboldt searches or to the removal of any copper from the roll-off.

A state magistrate issued the requested warrant. Nothing in the record indicates that that magistrate was aware of any of the additional searches of the

---

have been inadvertently removed from the plant.

Said copper and steel will be seized for the purpose to be used as evidence against person(s) who committed the crime of theft from the General Electric Co.

Information from Fuchs is believed based upon his full and complete cooperation with this Police Department.

Information from Sgt. Olson, Officer Holmwood and Det. Watts is believed based upon their involvement in this investigation and their professional status as Police Officers.

Fuchs testified at the trial consistently with the information attributed to him in the affidavit. He was not called to testify at the suppression hearing.

roll-off or seizures of copper not recited in the affidavit.

The roll-off was seized pursuant to the warrant; the top layer of steel was removed; and the copper was weighed. The roll-off was found to contain approximately 26,000 pounds of copper. J.A. 335.

A federal grand jury subsequently returned an indictment against Lincoln, Leroy, and a third defendant, William Henry, who was a GE employee. Count one charged that the defendants had violated 18 U.S.C. § 371 by conspiring to transport stolen property in interstate commence, in violation of 18 U.S.C. § 2314. Counts two through eight charged substantive violations of 18 U.S.C. § 2314.

After indictment, all three defendants moved to suppress the fruits

of the search and seizure of the roll-off. The argued that the warrant was invalid because it was based on prior warrantless searches that violated the Fourth Amendment. After a hearing, the district court denied the motions to suppress. The district court did not make any findings of fact. The court merely wrote:

> Defendant Howard C. Lincoln's Motion to Suppress Evidence, joined in by other defendants, is DENIED. See Illinois v. Gates, 462 U.S. 213 (1983); Minnesota v. Olsen, 110 S.Ct. 1684 (1990); Katz v. United States, 389 U.S. 347 (1967); United States v. Dunn, 480 U.S. 294 (1987), and Murray v. United States, 487 U.S. 533 (1988).

The defendants were tried before a jury. At the conclusion of its case-in-chief, the court granted Henry's motion for judgment of acquittal on all charges, and the government agreed to

the dismissal of three of the substantive counts with respect to the other defendants. The jury subsequently found Lincoln and Leroy guilty on the conspiracy count but not guilty of the remaining substantive offenses.

II.

The defendants contend that the district court erred in denying their motions to suppress. The government argues, however, that the motions were properly denied for three independent reasons: first, because the defendants did not have a legitimate expectation of privacy in the contents of the roll-off; second, because the seizure was proper under the plain view doctrine; and third, because the seizure was proper pursuant to the independent source doctrine.

A. We turn first to the independent source doctrine. In United States v. Murray, 487 U.S. at 542, the Supreme Court summarized this doctrine as follows:

> The ultimate question, therefore, is whether the search pursuant to warrant was in fact as genuinely independent source of the . . . tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial [unlawful] entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

We have subsequently rephrased this test into the following two questions (United States v. Herrold, 962 F.2d 1131, 1144 (3d Cir. 1992)):

> (1) [W]hether a neutral justice would have issued the search warrant even if not presented with information that had been obtained during an unlawful search and (2) whether the first [unlawful] search prompted the officers to obtain the search warrant. If the answers to

> these questions are yes and no respectively . . . then the evidence seized during the warranted search, even if already discovered in the original entry, is admissible.

In this case, we believe that the first prong of this test was satisfied. Fuchs was not a state actor and had not made any contact with state actors when he carried out his search. Thus, his search did not violate the Fourth Amendment. See, e.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614 (1989); Burdeau v. McDowell, 256 U.S. 465, 475 (1921). Assuming without deciding that the Watts, Middendorf, and Seyboldt searches were all unconstitutional, the taint of those searches would extend only to the brief paragraph in the affidavit describing the information provided by Seyboldt. The remainder of the

information came from Fuchs and was based entirely on his knowledge and observations prior to his phone call to Holmwood. Fuchs himself obtained no new information to convey to the police from his presence at the Watts search.

When read with the Seyboldt paragraph excised, the affidavit contains more than enough probable cause to justify the warrant. Before contacting the authorities, Fuchs knew that the roll-off he had transported was supposed to have contained silicon steel, that it in fact contained a great deal of copper, that the copper had been placed in the roll-off in such a way as to conceal it from view, that he had been told to treat the load differently from other loads he had taken from GE to the Chestner Yard, and that other employees at the Yard were aware of the unexpected

content of the roll-off. The magistrate was supplied in the affidavit with all of this information. These facts would more than justify a reasonable person in suspecting that crime, rather than mere mistake or inadvertence, was the more probable explanation for the presence of the copper in the roll-off. Furthermore, while Sergeant Middendorf's affidavit did not tell the magistrate everything Middendorf knew about the roll-off (in that it omitted any mention of the Watts and Middendorf searches), the affidavit did not in any way mislead the magistrate by failing to disclose information tending to undermine or contradict the information provided. Rather, it failed to disclose accurate information (albeit obtained by warrantless search and seizure) confirming in all respects the

information provided.

While we are satisfied that the first prong of the Murray-Herrold test is met, we cannot, without a factual finding by the district court, determine whether the second prong was also met. In Murray, 487 U.S. at 543, the Supreme Court emphasized the importance of obtaining a factual finding by the district court on the question whether the decision to seek the warrant was prompted by what had been seen during an earlier, unlawful entry. Accordingly, in the present case, the district court should make a specific finding on this question.

B. As noted, the government also contends that the search and seizure were justified under the plain view doctrine. As the Supreme Court observed in Horton v. California, 496 U.S. 128,

136 (1990), "[I]t is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." Furthermore, in Arizona v. Hicks, 480 U.S. 321, 325 (1987), where an officer who lacked probable cause to believe that a stereo was stolen moved the stereo to inspect the serial numbers, the Court held that the search for the serial number could not be justified under the plain view doctrine.

In the present case, in order to apply the plain view doctrine, it is important to know (a) where each of the searching officers stood or was perched when he peered into the roll-off and (b) whether the copper that these officers

saw and took was visible without moving the upper layer of metal in the roll-off. We have examined the pertinent portions of the record, but we do not find them to be entirely clear. Accordingly, if the district court finds it necessary on remand to decide whether the plain view doctrine applies, the court should make findings on these questions.

C. Finally, the government contends that the search and seizure did not violate the defendants' legitimate expectations of privacy. Resolution of this issue would also be aided by findings of fact.

In order to contest the searches and seizures at issue here, each defendant was required to show that he personally had a legitimate expectation of privacy in the contents of the roll-

off. Rakas v. Illinois, 439 U.S. 128, 130 n.1, 138-40 (1979). The roll-off apparently belonged to Lincoln Metal rather than the individual defendants, and corporate officers and employees do not necessarily have a legitimate expectation of privacy in all corporate premises and property. See, e.g., United States v. Mohney, 949 F.2d 1397, 1405 (6th Cir. 1991); United States v. Chuang, 897 F.2d 646, 649-50 (2d Cir. 1990); United States v. Judd, 889 F.2d 1410, 1413 (5th Cir. 1989). Thus, if the district court on remand finds it necessary to decide whether the defendants had legitimate expectations of privacy in the contents of the roll-off, the court should make findings bearing on each defendant's personal relationship to the roll-off and the degree to which others had legitimate

access to the roll-off.[3]

III.

The defendants next argue that their alleged conduct in conspiring to transport stolen property in interstate commerce did not violate 18 U.S.C. § 371, which prohibits, inter alia, conspiracies "to commit any offense against the United States." The defendants maintain that this language refers to only those conspiracies in which the United States is the targeted victim in some concrete sense. Here, the United States was not the targeted victim of the defendants' crime in this sense; the targeted victim was GE.

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[3] The court should also determine whether the roll-off was located on corporate property, a fact that is relevant although not necessarily dispositive.

The defendants rely on United States v. Hope, 861 F.2d 1574 (11th Cir. 1988), which read Tanner v. United States, 483 U.S. 107 (1987), to require this narrow reading of 18 U.S.C. § 371. Hope, however, is no longer good law. Three weeks after Lincoln and Leroy filed their brief in this case, the Eleventh Circuit en banc overruled Hope. United States v. Falcone, 960 F.2d 988 (11th Cir. 1992) (en banc). Adopting Chief Judge Tjoflat's reasoning in his special concurrence at the panel stage (United States v. Falcone, 934 F.2d 1528, 1548 (11th Cir. 1991) (Tjoflat, C.J., specially concurring)), the en banc court held that a conspiracy to violate any federal criminal statute is a conspiracy to "commit [an] offense against the United States." We agree.

At common law, all felony

indictments averred that the defendant had acted against the peace and dignity of the king, as well as against the particular subject of the king who was the direct victim of the crime. As Blackstone wrote (4 Commentaries at 2):

> [T]he king, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offence.

For the reasons explained in Chief Judge Tjoflat's opinion (934 F.2d at 1548), we are convinced that 18 U.S.C. § 371 adopted the same usage and that 18 U.S.C. § 371 consequently applies to all conspiracies to violate the laws of the United States.

IV.

Each defendant's presentence report (paragraph 26 in both cases) recommended an eight-level increase in offense level[4] under U.S.S.G. § 2B1.2(b)(1) "since the value of the stolen property

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[4] Without that increase, both defendants' offense levels would be six, with a sentencing range, given their criminal history category, of 0-6 months, rather than the 15-21 months that was actually calculated. The base level for the offense which was the object of the conspiracy, interstate transportation of stolen property, is 4. U.S.S.G. § 2B1.2(a). Both defendants received a 2-point upward enhancement based on a finding that the offense involved more than minimal planning. Id. at (b) (4) (B). They do not contest this adjustment. Furthermore, while U.S.S.G. § 2X1.1(b) (2) provides: "If a conspiracy, decrease by 3 levels unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control," neither defendant has argued that he is entitled to this 3-level reduction.

was more than $100,001 but less than $200,000."[5] Lincoln objected to this recommendation because "[t]he offense level cannot be increased for the conduct contained in the substantive counts on which the Defendant was acquitted." J.A. 41. Leroy made an identically phrased objection. J.A. 59.[6] After noting the defendants' objections and their basis, the trial judge nonetheless accepted the

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[5] Effective subsequent to most of the acts charged as part of the defendants' conspiracy, the Guidelines were amended so that the eight-level increase is now used for losses greater than $70,000 but no greater than $120,000. U.S.S.G. § 2B1.1, incorporated by reference in §2B1.2.

[6] The defendants also made objections which have not been pursued on appeal relating to the judge's calculation of the appropriate price per pound of the stolen copper and the number of pounds involved.

recommendation of the presentence report, observing that the burden of proof in sentencing proceedings is lower than in the criminal trial itself.[7] Jan. 28, 1992 Tr. at 5-11; Jan. 30, 1992 Tr. at 5.

We agree with the district court's general analysis. While the elements of a criminal offense itself must be proven beyond a reasonable doubt, the predicate facts for a decision to adjust a defendant's offense level up or down under the Sentencing Guidelines need only be proven by the preponderance of the evidence. United States v. McDowell, 888 F.2d 285, 290-91 (3d Cir. 1989). An acquittal represents the

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[7] The judge also cited United States v. Isom, 886 F.2d 736 (4th Cir. 1989) and United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989). Jan. 30, 1992 Tr. at 5.

jury's conclusion that the elements of the offense have not been proven beyond a reasonable doubt. That conclusion is not inconsistent with a conclusion by the sentencing judge that the same facts have been proven by preponderance of the evidence. In United States v. Ryan, 866 F.2d 604, 609 (3d Cir. 1989), we wrote:

> Before the guidelines were promulgated, a court was permitted to consider evidence on counts of which a defendant was acquitted in sentencing the defendant. Despite [appellant's] claims of error, the guidelines, as we read them, indicate that the Commission intended to permit sentencing courts to continue to consider such information in determining whether to depart from the applicable guideline.

Ryan involved the facts which could be used to justify departure upward from the Guidelines offense level sentencing range, not the facts which can be used to determine the proper Guidelines

offense level in the first place. We do not, however, think that this distinction makes a difference.

Ryan also did not involve an explicit constitutional challenge. The defendants here argue that "[c]onsidering acquitted conduct as relevant conduct violated the Defendants' Fifth Amendment protections against double jeopardy, their right to due process of law and denied them their Sixth Amendment right to have their guilt determined by a jury." Appellants' br. at 40-41. We reject these arguments.[8]

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[8] Defendants cite United States v. Brady, 928 F.2d 844 (9th Cir. 1991), and United States v. Clark, 792 F. Supp. 637 (E.D. Ark. 1992), in support of their constitutional claims. Brady is of extremely limited persuasive value in this circuit, insofar as it rejects our own previous analysis in Ryan. 928 F.2d at 851. Furthermore, Brady has subsequently been explicitly rejected by many other circuits. United States v. Masters, 978 F.2d 281, 286 (7th Cir.

The defendants' double jeopardy argument is fallacious because their sentences were imposed as punishment for the offense for which they were convicted, not for the offenses for which they were acquitted. The defendants were convicted by a jury of the conspiracy count and the conspiracy statute, 18 U.S.C. § 371, authorized sentences of imprisonment of not more than five years. The defendants' 15 month sentences are thus well under the maximum provided by the statute. Reliance on the fact of an earlier

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1992); United States v. Boney, 977 F.2d 624, 635-36 (D.C. Cir. 1992); United States v. Olderbak, 961 F.2d 756, 764-65 (8th Cir. 1992); United States v. Coleman, 947 F.2d 1424, 1429 (10th Cir. 1991). To the extent Clark was not inconsistent with Olderbak, it was fatally undermined by the Eighth Circuit's later decision in United States v. Galloway, 976 F.2d 414 (8th Cir. 1992) (en banc).

conviction in calculating a higher sentence for a current conviction, as the Guidelines do systematically by their use of criminal history categorization, does not violate defendants' double jeopardy right not to be "punished twice" for the first offense. They are not being punished twice for the first offense; they are being punished more severely for the second offense. The same logic applies to the double jeopardy claim here.

The defendants' Sixth Amendment argument lacks merit since it is established that the right to a jury trial does not apply to sentencing. See, e.g., Hildwin v. Florida, 490 U.S. 638 (1989).

Finally, although the defendants baldly assert that their due process rights were violated, they do not

explain the precise basis for this argument. If this argument differs from their double jeopardy and jury trial arguments, the defendants must be arguing that the Due Process Clause requires that sentencing facts be proven beyond a reasonable doubt. This argument is inconsistent with settled precedent. See, e.g., Williams v. New York, 337 U.S. 241 (1949); United States v. McDowell, 888 F.2d at 290-91. We therefore reject it.

V.

In the sentencing proceedings, each defendant requested a two-point reduction in his adjusted offense level for acceptance of responsibility, as provided in U.S.S.G.. § 3E1.1(a). At the time the defendants were sentenced, this subsection read: "If the defendant

clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels."[9]

The defendants pled not guilty and went to trial. However, they chose not to testify, and neither defendant put on a case of his own. After the conclusion of the prosecution's case-in-chief, which had been interspersed with

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[9] "Ordinarily, we must apply the Guidelines in effect at the time of sentencing. However, where the Guidelines have been amended subsequent to the commission of the crime so as to increase a defendant's base offense level, ex post facto concerns require us to apply the earlier Guidelines." United States v. Shirk, 981 F.2d 1382, 1395 (3d Cir. 1992) (citations omitted), as amended, Feb. 16, 1993. Subsection 3E1.1(a) was amended subsequent to the commission of the crime, but not until after defendants were sentenced. Effective as of November 1, 1992, it reads: "If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels."

substantial cross-examination of the prosecution's witnesses by defense counsel, both defendants elected to rest and to argue to the jury that the prosecution had not met its burden of proof. After the guilty verdicts, but before sentencing, presentence reports were prepared for each defendant. Those reports accurately stated that, as of the date the reports were prepared, neither defendant had made any statement purporting to accept responsibility. Subsequently, each defendant gave the court an identical written statement, which read:

> It is my intention to appeal my conviction on Count 1. Accordingly, on the advice of counsel, I invoke my rights under the Fifth Amendment to the United States Constitution not to make a factual statement concerning the offense of conviction or related conduct because such a statement might be used to incriminate me should this conviction be

overturned on appeal.

> My inability, at this time, to make a factual statement demonstrating my acceptance of responsibility is not intended to convey any disrespect for the Court or the legal process. I recognize that the jury's verdict of guilty on Count 1 subjects me to possible imprisonment and/or fines by the Court and I am prepared to accept responsibility for my conduct as the jury found it to be.
>
> In the legal posture in which my case presently stands, I cannot say more without waiving my constitutional rights and I ask the Court, not to punish me for asserting my constitutional rights, and to grant me credit for acceptance for [sic] responsibility under the Federal Sentencing Guidelines.

The district court in effect held that this statement, standing alone, was inadequate proof of acceptance of responsibility and that denial of the two-level reduction did not violate the defendants' Fifth Amendment rights. Defendants appeal this ruling. They rely primarily on our decision in United

States v. Frierson, 945 F.2d 650 (3d Cir. 1991), cert. denied, 112 S. Ct. 1515 (1992). In Frierson, we held that "a denied (Section 3E1.1) reduction in sentence is a penalty in the context of Fifth Amendment jurisprudence" (id. at 660), and that it would be unconstitutional to deny a Section 3E1.1 reduction "because of an exercise of the Fifth Amendment privilege, [or] because of any statements compelled pursuant to a threat against exercise of the privilege" (id. at 664).

We read Frierson to hold that if a defendant asserts his Fifth Amendment right during a sentencing hearing and refuses to discuss conduct for which he has not pled guilty, the court may not weigh that assertion against the defendant. Nevertheless, as Frierson recognized, albeit in dicta:

> In a case where the defendant has consistently asserted the privilege . . . a sentencing judge confronting an acceptance of responsibility issue obviously must not draw any inference from the fact that the privilege has been claimed. . . . [T]he judge cannot rely on the defendant's failure to admit to such acts as a basis for denying the two-level reduction. But that in no way implies an automatic two-level reduction for such a defendant. The sentencing judge must address the acceptance of responsibility issue on the basis of all of the record evidence relevant to that issue. One probative fact will be whether the defendant has admitted the conduct constituting the offense of conviction. But the record may contain other helpful facts as well. Application Note 1 to § 3E1.1 lists . . . factors other than admissions by the defendant to consider in determining acceptance of responsibility; and that list is not exhaustive.

Id. at 663 (emphasis added).

We note that Frierson expressly declined to decide "whether a convicted defendant who exercised his privilege at trial has a Fifth Amendment right not to discuss his offense pending direct

appeal." Id. at 662 n.7 (emphasis omitted). We also need not decide that issue. Regardless of whether defendants had such a Fifth Amendment right, the sentencing judge was required to determine the acceptance of responsibility issue "on the basis of all of the record evidence relevant to [acceptance of responsibility]." Id. at 663. In this case the only relevant record evidence was the defendants' bald assertion that they were "prepared to accept responsibility for [their) conduct as the jury found it to be."

We hold that these words do not clearly and unequivocally demonstrate an acceptance of responsibility under Section 3E1.1. We say this because the Sentencing Guidelines contemplate an acceptance of responsibility that is both affirmative and in the present

tense. Relevant evidence is not limited to whether the defendant has made an admission of factual guilt. Rather, it may include facts showing the existence of other factors as set forth in the Application Notes to Section 3E1.1.[10] Such were not tendered here. This requirement does not compel a defendant to incriminate himself. What it does do is limit the availability of the reduction to those who have clearly made

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[10] Examples of other factors that should be considered are: (1) "voluntary termination or withdrawal from criminal conduct or associations"; (2) "voluntary payment of restitution prior to adjudication of guilt"; (3) "voluntary surrender to authorities promptly after commission of the offense"; (4) "voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense"; (5) "voluntary resignation from the office or position held during the commission of the offense"; and (6) "the timeliness of the defendant's conduct in manifesting the acceptance of responsibility." U.S.S.G. § 3E1.1, comment. (n.1).

the requisite showing.

If we accepted the defendants' argument and held that they were entitled to a two-level reduction under Section 3E1.1, then virtually every defendant who was tried and convicted could easily obtain a similar reduction. Virtually every such defendant could submit a statement similar to those submitted here. As a result, Section 3E1.1 would be rendered essentially meaningless. Most defendants who went to trial and vigorously contested their guilt would be eligible to receive the same relief under Section 3E1.1 as those who pled guilty. We are convinced that this is not what the Commission intended. Nor do we believe that the Constitution requires such results. See Corbitt v. New Jersey, 439 U.S. 212, 218-19 (1978); Bordenkircher v. Hayes,

434 U.S. 357, 364 (1978); Brady v. United States, 397 U.S. 742, 751 (1970).

VI.

In conclusion, we vacate the judgments and remand this case for further proceedings regarding the defendants' suppression motions.[11] We reject the defendants' remaining arguments.

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[11] If the district court concludes, after making the necessary findings, that the suppression motions were properly denied, the judgments previously entered may be reinstated. On the other hand, if the court concludes that those motions should have been granted in whole or part, the court should determine whether the admission of the evidence that should have been suppressed requires the granting of a new trial.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

Circuit Judge

(3)

FILED
AUG 26 1993
OFFICE OF THE CLERK

No. 93-72

In the Supreme Court of the United States

OCTOBER TERM, 1993

HOWARD C. LINCOLN AND NEIL C. LEROY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether a district court may consider at sentencing conduct involved in a charge on which the defendant has been acquitted.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-43, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1993. The petition for a writ of certiorari was filed on July 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of conspiracy to transport stolen property in interstate commerce, in violation of 18 U.S.C. 371 (Count 1). The district court sentenced petitioner Lincoln to a term of 15 months' imprisonment, to be followed by a two-year period of supervised release, and ordered him to pay $54,000 in restitution. The court sentenced petitioner Leroy to the same term of imprisonment and period of supervised release, and ordered him to pay $13,500 in restitution.[1] The court of appeals affirmed petitioners' sentences, but remanded the case in part for further proceedings in the district court on one of petitioners' claims. Pet. App. 1-43; Gov't C.A. Br. 4.

1. Petitioners conspired to steal scrap copper from a General Electric (GE) plant in Erie, Pennsylvania, and to ship the stolen copper across state lines. Lincoln Metal Processing, Inc., of which petitioner Lincoln was president and petitioner Leroy was an employee, had a contract with GE to purchase and remove scrap metal from the GE plant. Under petitioners' scheme, a co-conspirator at the plant would fill "roll-offs"[2] with a

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[1] Petitioners were acquitted of four substantive counts charging them with transporting stolen property in interstate commerce, in violation of 18 U.S.C. 2314 (Counts 2, 4, and 6-7). Previously, at the close of the government's case-in-chief, the district court had granted co-defendant William Henry's motion for judgment of acquittal on all charges filed against him (Counts 1-7), and the government agreed to the dismissal as to petitioners of three counts of transporting stolen property (Counts 3, 5, and 8). Pet. App. 13-14; Gov't C.A. Br. 3-4.

[2] A "roll-off" is a large, open-topped metal bin used to store and transport scrap. Once a roll-off is filled with scrap, it can be loaded onto a truck, moved, and off-loaded again as a unit. A roll-off can

considerable amount of copper and then add a top layer of steel to conceal the copper. GE would then bill Lincoln Metal for these loads at the price per pound for scrap steel, which was substantially less than that for copper. The loads would be hauled away, the steel removed, and the copper resold to out-of-state purchasers at a large profit. Pet. App. 4-5; Gov't C.A. Br. 5-6, 9-14.

On August 29, 1989, Robert Fuchs, a truckdriver for Lincoln Metal, became suspicious about a load that he had transported the day before from the GE plant to Lincoln Metal's Chestner yard. Fuchs had left the roll-off outside the fence of the yard. After hearing co-workers gossip about the actual contents of the roll-off, he looked inside the roll-off himself before going home for the day. He found that under the top layer of steel the roll-off was full of copper. Pet. App. 6; Gov't C.A. Br. 7.

After he arrived home, Fuchs called Erie County deputy sheriff Harry Holmwood and told him of his findings and suspicions. Holmwood in turn called county detective Mark Watts. Fuchs, Holmwood, and Watts met sometime after 8 p.m. and drove to the site of the roll-off. They confirmed that the roll-off contained copper and removed several pieces. Pet. App. 6-7; Gov't C.A. Br. 7-8.

Watts then called the Lawrence Park Township police. Just before midnight, Fuchs, Holmwood, and Watts went to the Lawrence Park Township police station, where they spoke with Sergeants Olson and Middendorf. Following these conversations, Holmwood and Middendorf drove to the roll-off. They confirmed again that it contained copper and removed some additional pieces. Pet. App. 7; Gov't C.A. Br. 6, 8.

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also be moved as a unit within a scrap yard by crane. Pet. App. 5 n.1.

Once Middendorf returned to the police station, he contacted David Seyboldt, a GE employee. Seyboldt came to the station, examined a piece of copper that Middendorf had removed from the roll-off, and stated that it was similar to the scrap that GE produced. The next morning, Seyboldt went to the roll-off himself, determined that it contained a great deal of copper of the sort GE produced, and then informed the police. Pet. App. 7-8; Gov't C.A. Br. 8.

Middendorf swore out an affidavit and applied to a state judge for a warrant to seize the roll-off and its contents. In the affidavit, Middendorf relied on Fuchs's initial search of the roll-off to show that it contained copper, and on information from Seyboldt to show that the copper was GE's. The affidavit also relied on information from Fuchs and Seyboldt about GE and Lincoln Metal practices in handling copper scrap to show that the copper in the roll-off had been taken from GE unlawfully. Pet. App. 8-9; Gov't C.A. Br. 8.

After a state magistrate issued the warrant, the roll-off was seized, the top layer of steel was removed, and the copper was weighed. The roll-off was found to contain approximately 26,000 pounds of copper. Pet. App. 11-12; Gov't C.A. Br. 8.

2. Petitioners were convicted of conspiring to transport stolen property, but they were acquitted of the substantive counts charging them with transporting stolen property. Their presentence reports (PSRs) recommended an eight-level increase in their offense levels pursuant to Sentencing Guidelines § 2B1.2(b)(1) (Nov. 1, 1988)[3] because "the value of the stolen property was more

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[3] After most of the acts charged as part of petitioners' conspiracy had been committed, the Sentencing Guidelines applicable to petitioners' offense were amended, United States Sentencing Comm'n, *Guidelines Manual* App. C, at 39-40 (1992) (amend. 99; effective Nov. 1, 1989), but the amendment is not

than $100,001 but less than $200,000." Pet. App. 26-27. The probation office based that recommendation on its finding that petitioners had caused five loads of stolen copper worth approximately $21,600 each to be shipped across state lines. Gov't C.A. Br. 36. The recommended enhancements raised petitioners' offense levels from 6 to 14 and elevated their indicated Sentencing Guidelines ranges from 0-6 months' imprisonment to 15-21 months' imprisonment. Pet. App. 26 n.4.

Petitioners objected that their offense levels should not be increased for the conduct charged in the substantive counts, on the ground that the Constitution prohibits punishing someone for conduct of which he has been acquitted. The district court, however, rejected their claim and adopted the recommendations of the PSRs, explaining that the standard of proof at sentencing is lower than at trial. Pet. App. 27-28; Tr. 1419, 1424-1425, 1430-1431, 1447-1448, 1449, 1462.

3. The court of appeals affirmed the upward adjustments. Pet. App. 26-33. The court of appeals agreed with the district court's general analysis, explaining that because sentencing facts need be proved only by a preponderance of the evidence, use of acquitted conduct to adjust a sentence is not inconsistent with a jury's conclusion that the elements of an offense have not been proved beyond a reasonable doubt. *Id.* at 28-29.

Petitioners had argued, see Pet. App. 30, that considering acquitted conduct at sentencing violated their double jeopardy, due process, and Sixth Amendment rights. The court of appeals also rejected those arguments. *Id.* at 31-33. The court reasoned that "because [petitioners'] sentences were imposed as punishment for the offense for which they were convicted, not for the offenses for which

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material to the question presented in the petition. See Pet. App. 27 n.5.

they were acquitted," their double jeopardy rights were not violated. *Id.* at 31-32. The court also concluded that since the right to a jury trial does not apply at sentencing, petitioners' Sixth Amendment rights were not violated. *Id.* at 32. Finally, the court ruled that because facts used at sentencing need not be proved beyond a reasonable doubt, petitioners' due process rights also were not violated. *Id.* at 32-33.[4]

ARGUMENT

Petitioners claim that a district court determining the sentence for a convicted defendant cannot consider conduct charged in counts on which the defendant has been acquitted. Pet. 7-23. They argue more specifically that such consideration of acquitted conduct violates their right to be free from double jeopardy. Pet. 7-19. Petitioners' claim does not warrant review by this Court.

1. This Court has recognized for many years that "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Williams* v. *New York*, 337 U.S. 241, 247 (1949). For that reason, "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the

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[4] The court of appeals rejected petitioners' claims that their conduct did not violate 18 U.S.C. 371, Pet. App. 23-25, and that the district court had erred in denying them a reduction to their base offense level for acceptance of responsibility, *id.* at 33-41. Since the district court had not made findings of fact in support of its denial of petitioners' motions to suppress the fruits of the search and seizure of the roll-off, the court of appeals remanded the case so that the district court could make the factual findings necessary to resolve the parties' claims. *Id.* at 42. Petitioners indicate that the district court has denied their suppression motion on remand. Pet. 2 n.1.

sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id.* at 246. Historically, therefore, a district judge at sentencing could "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come," and a sentence imposed within statutory limits would not be disturbed unless it was "founded at least in part upon misinformation of constitutional magnitude." *United States* v. *Tucker*, 404 U.S. 443, 446-447 (1972).

Before the Sentencing Guidelines came into effect, this Court repeatedly stated that a trial court could consider at sentencing evidence concerning a crime for which the defendant was never charged, tried, or convicted. *E.g.*, *United States* v. *Grayson*, 438 U.S. 41, 45-52 (1978) (trial court may consider defendant's perjury committed during trial testimony); *Williams* v. *New York*, 337 U.S. at 244 (trial court may consider other crimes committed by the defendant). Similarly, the lower courts consistently had concluded that a sentencing court could consider evidence regarding a crime for which the charges had been dismissed,[5] for which the defendant's conviction had been reversed on appeal,[6] or for which—as in this case—the defendant had been acquitted at trial.[7]

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[5] *E.g.*, *United States* v. *Ortiz*, 742 F.2d 712, 714 n.3 (2d Cir.), cert. denied, 469 U.S. 1075 (1984); *United States* v. *Hansen*, 701 F.2d 1078, 1081 (2d Cir. 1983); *United States* v. *Needles*, 472 F.2d 652, 654-656 (2d Cir. 1973); *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965).

[6] *E.g.*, *United States* v. *Atkins*, 480 F.2d 1223, 1224 (9th Cir. 1973).

[7] *E.g.*, *United States* v. *Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (Scalia, J.) (dictum) ("It is well established that a sentencing judge may take into account facts introduced at trial relating to

The Sentencing Guidelines embrace those principles. Section 6A1.3(a) provides that a court "resolving any reasonable dispute concerning a factor important to the sentencing determination * * * may consider relevant information without regard to its admissibility under the rules of evidence at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." If there is a question about the reliability of the information available to the court, the appropriate response is not—as petitioner suggests—to ignore probative information, but instead to conduct an evidentiary hearing to resolve that question. See Sentencing Guidelines § 6A1.3, Commentary.

In arguing that a sentencing court errs when it considers facts underlying charges on which a defendant has been acquitted, petitioners overlook the fact that different standards of proof apply at the guilt and sentencing stages. Although the beyond-a-reasonable-doubt standard applies to the resolution of the question of the defendant's factual guilt at the guilt stage of a criminal case, *In re Winship*, 397 U.S. 358 (1970), the Constitution does not require that the government prove facts relevant to sentencing to that degree of certainty; rather, the preponderance-of-the-evidence standard provides all the process due under the Fifth Amendment. *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). An acquittal does not prove that the defendant did not commit the charged acts; it establishes only that the government

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other charges, even ones of which the defendant has been acquitted."); *United States* v. *Funt*, 896 F.2d 1288, 1300 (11th Cir. 1990) ("an acquittal does not bar a sentencing court from considering the acquitted conduct in imposing sentence"); *United States* v. *Bernard*, 757 F.2d 1439, 1444 (4th Cir. 1985); *United States* v. *Morgan*, 595 F.2d 1134, 1136-1137 (9th Cir. 1979); *United States* v. *Cardi*, 519 F.2d 309, 314 n.3 (7th Cir. 1975); *United States* v. *Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972).

failed to demonstrate the defendant's guilt beyond a reasonable doubt. Accordingly, a finding that the government did not prove the existence of a fact beyond a reasonable doubt in the guilt stage of a criminal trial does not bar the government from attempting to prove the existence of that fact in other circumstances where the lower, preponderance standard of proof is applicable. See *Dowling* v. *United States*, 493 U.S. 342, 348-350 (1990); *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 361-362 (1984); *One Lot Emerald Cut Stones & One Ring* v. *United States*, 409 U.S. 232, 235 (1972); *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938). Given the different standards of proof that apply at the two different stages of a criminal case, the Constitution does not bar a sentencing court from finding facts that a jury has rejected in the course of returning a not-guilty verdict.

Petitioners nevertheless contend that the Double Jeopardy Clause bars consideration of acquitted conduct at sentencing. As the court of appeals correctly ruled, Pet. App. 31-32, however, consideration of conduct for which a defendant has been acquitted does not violate the Double Jeopardy Clause because that conduct is considered, not to punish the defendant for a crime of which he has not been convicted, but to increase his sentence for a crime of which he has been convicted. See *United States* v. *Rodriguez-Gonzalez*, 899 F.2d 177, 181 (2d Cir.), cert. denied, 498 U.S. 844 (1990); *United States* v. *Mocciola*, 891 F.2d 13, 17 (1st Cir. 1989); *United States* v. *Juarez-Ortega*, 866 F.2d 747, 749 (5th Cir. 1989).[8]

2. Since the Sentencing Guidelines went into effect on November 1, 1987, 11 of the regional courts of appeals

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[8] Petitioners' reliance on *Coffey* v. *United States*, 116 U.S. 436, 443 (1886), is misplaced. This Court has repudiated the rationale of *Coffey*. See *United States* v. *One Assortment of 89 Firearms*, 465 U.S. at 361, 366.

have agreed that a sentencing court may rely on evidence of a defendant's conduct relating to charges on which the defendant was acquitted at trial. See *United States* v. *Boney*, 977 F.2d 624, 635-636 (D.C. Cir. 1992); *United States* v. *Mocciola*, 891 F.2d at 16-17; *United States* v. *Rodriguez-Gonzalez*, 899 F.2d at 180-181; *United States* v. *Ryan*, 866 F.2d 604, 608-609 (3d Cir. 1989); *United States* v. *Isom*, 886 F.2d 736, 738-739 (4th Cir. 1989); *United States* v. *Juarez-Ortega*, 866 F.2d at 749; *United States* v. *Duncan*, 918 F.2d 647, 652 (6th Cir. 1990), cert. denied, 111 S. Ct. 2055 (1991); *United States* v. *Fonner*, 920 F.2d 1330, 1332-1333 (7th Cir. 1990); *United States* v. *Dawn*, 897 F.2d 1444, 1449-1450 (8th Cir.), cert. denied, 498 U.S. 960 (1990); *United States* v. *Coleman*, 947 F.2d 1424, 1428-1429 (10th Cir. 1991), cert. denied, 112 S. Ct. 1590 (1992); *United States* v. *Averi*, 922 F.2d 765, 765-766 (11th Cir. 1991). The sole exception is the decision of a divided panel of the Ninth Circuit in *United States* v. *Brady*, 928 F.2d 844, 851-852 (1991).

The conflict between *Brady* and the settled weight of authority in the other circuits does not warrant review. That conflict involves the construction of the Sentencing Guidelines and therefore is a matter that the Sentencing Commission is entirely capable of resolving. See *Stinson* v. *United States*, 113 S. Ct. 1913 (1993); *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991). In the wake of the *Brady* decision, the Sentencing Commission sought comment "on whether it should provide expressly that conduct of which a defendant is acquitted, but which the court at sentencing nevertheless determines to have been established by a preponderance of the evidence, may be used [to determine the defendant's sentence under the Sentencing Guidelines]." 57 Fed. Reg. 113 (1992) (Proposal 35(C)). Although the Sentencing Commission neither accepted nor rejected such a provision in its 1993 series of amendments to the Sentencing Guidelines, the

Commission could resolve the issue by a change in the Guidelines in the future. Review by this Court is therefore unnecessary at this time. This Court has repeatedly denied review in cases presenting this issue during the two years since *Brady* was decided.[9] There is no need to treat this petition differently.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] See, *e.g.*, *Rodriguez* v. *United States*, 113 S. Ct. 3019 (1993); *Langh* v. *United States*, 113 S. Ct. 2366 (1993); *Martin* v. *United States*, 113 S. Ct. 1058 (1993); *Banks* v. *United States*, 113 S. Ct. 470 (1992); *Olderbak* v. *United States*, 113 S. Ct. 422 (1992); *Allison* v. *United States*, 113 S. Ct. 420 (1992); *Coleman* v. *United States*, 112 S. Ct. 1590 (1992); *Van Tassel* v. *United States*, 112 S. Ct. 662 (1991); *Lawrence* v. *United States*, 112 S. Ct. 372 (1991); *Duncan* v. *United States*, 111 S. Ct. 2055 (1991). The issue is also pending before the Court in *Hill* v. *United States*, No. 92-8874, and *Frias* v. *United States*, No. 92-9190.